Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 72-1679.

GRINNELL CORPORATION,
CROSS-PETITIONER,

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND, PETITIONERS.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Thee cross-petitioner, Grinnell Corporation, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals is reported in 475 F. 2d 449 and that of the United States District Court for the District of Rhode Island is reported in 344 F. Supp. 749 (D. R.I. 1972). Both opinions appear as appendices to the petition for a writ of certiorari.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 15, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether a Rhode Island statute which provides for payment of unemployment compensation benefits to strikers as such, irrespective of need, is, *per se*, an impermissible intrusion on the federal policy of free collective bargaining.

2. Whether the payment pursuant to such statute of unemployment benefits to substantially all of plaintiff's striking employees, totaling 72 per cent of take-home pay, is an impermissible intrusion into an area preempted by Congress.

3. Whether the court below is correct when, on remand, it imposes on plaintiff the burden of presenting a macrocosmic empirical conglomerate of statistical and subjective evidence to prove infringement upon federal labor policy and then, in addition, of proving that the state interest is less substantial than the federal interest.

Statutory Provisions Involved.

GENERAL LAWS OF RHODE ISLAND (1956), § 28-44-16.

"*Labor disputes.* — An individual shall not be entitled to benefits except for unemployment which continues subsequent to six (6) weeks in addition to his waiting period, if he became unemployed because of a strike or other industrial controversy in the establish-

ment in which he was employed; provided, that this section shall not apply if it is shown to the satisfaction of the director that the claimant is not a member of the organization or group responsible for the stoppage of work, and is not participating in or financing or in any way directly interested in the labor dispute which caused the stoppage of work."

Statement of the Case.

Cross-petitioner adopts the petitioner's "Statement of Facts and Travel of the Case" with the following addition.

The record before the District Court included uncontradicted evidence that upon expiration of the statutory waiting period all or virtually all of cross-petitioner's striking employees received weekly unemployment compensation payments approximating 72 per cent of their average prestrike take-home pay.

Reasons for Granting the Cross-Petition for Writ of Certiorari.

1. The Decision of the First Circuit Illustrates the Confusion and Inconsistency among the State and Federal Courts in Approaching the Preemption Question Inherent in State Subsidies to One or the Other Parties to a Labor Dispute.

Over the past several years an increasing number of cases have challenged the payment of public assistance benefits to strikers as being inconsistent with the national labor policy of free collective bargaining. See, *e.g.*, *ITT* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), cert den. 402 U.S. 933 (1971); *Lascaris* v. *Wyman*, 31 N.Y. 2d 386, 82 LRRM 2634 (1972); *Dow Chemical* v. *Taylor*, F. Supp. , 81 LRRM 2872 (E.D. Mich. 1972). See also *Almacs, Inc.* v. *Hackett*,

312 F. Supp. 964 (D. R.I. 1970), and *ITT* v. *Carter*, C. A. No. 3770 (D. R.I. 1967), both involving the same Rhode Island unemployment compensation statute as here and both having been discontinued without disposition on appeal because the underlying strikes were settled.

These challenges have increased as the use of public assistance by unions to support strikes has increased. This use has attained to the level of union policy and, indeed, has become endemic. Yet, as the decision below well illustrates, the federal and state courts are so confused and inconsistent in their approach to the problem that the need for this Court to define the scope of preemption in this area has become critical.

Beyond question, Congress has seen fit to regulate labor relations " to the full extent of its constitutional power under the Commerce clauses." *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951); *H. K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99, 108 (1970). Beyond question too, free collective bargaining is the linchpin of the congressional scheme. In turn, free collective bargaining is predicated on and presupposes the presence of economic weapons such as the strike and the lockout as the catalyst to bring about agreement. Because of pain or the threat of pain caused by these weapons, the parties will retreat from intransigent positions, search for compromise and ultimately reach a settlement.

This case, like *Minter, Lascaris, Dow* and the other cases, *supra*, questions the extent to which state legislation may alter the usual economic consequences suffered by the parties to a work stoppage. It raises the preemption problem. However, preemption cases on the whole have dealt with state laws purporting to *regulate* the activities of the parties to the collective bargaining process.

This regulation has tended to fall into one of two categories. Where, on the one hand, the activity sought to

be regulated is arguably protected by section 7 or prohibited by section 8 of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, the preemption question is resolved by reference to *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

Where, on the other hand, the activity sought to be regulated is neither arguably protected nor prohibited by the federal act, the relevant inquiry is, as enunciated in *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Lester Morton Trucking Co.*, 377 U.S. 252 (1964), ". . . whether the application of state law . . . would operate to frustrate the purpose of the federal legislation . . ." (at p. 258), by, for example, upsetting the balance of power between labor and management.

Where unemployment compensation or welfare is encountered, however, the courts seem to feel that the state legislation does not constitute "regulation" in the sense in which preemption cases use the term. This may explain the difficulty the courts are experiencing with the unemployment and welfare cases. (Of course, a state subsidy to one party in a labor dispute could, without offending reason, be deemed "regulation" of at least the incidents of a dispute; as yet though, to our knowledge, no court has dealt with this argument.)

The instant case illustrates this difficulty. The Court of Appeals for the First Circuit considers that the case is not governed by *Garmon* or by *Morton*, the two pronouncements by this Court in the field but, rather, by its own prior decision in *ITT* v. *Minter, supra*. It reverses the District Court only insofar as, in its view, that court misread *Minter* on the issue of justiciability.

The two cases, however, the case at bar and *Minter*, differ in form and substance. In *Minter*, the Circuit Court upheld the denial of a preliminary injunction against welfare

payments to strikers. The record indicated that an indeterminate number of strikers received benefits in an indeterminate amount pursuant to a statute having no specific reference to strikes or strikers and premising payments on need.

Here, by way of contrast to *Minter*, (a) the statute in question specifically grants to strikers as strikers the right to state aid, (b) the amount of aid and the number of recipients is not in the least conjectural, and (c) the benefits are paid without regard to need. Whether or not *Minter* is good law on welfare payments, it is clearly not applicable to the instant case.

In summary then, it may be argued that this case is governed by *Garmon, supra*, although its facts viewed conventionally do not easily adapt to the so-called *Garmon* rule. If not, the case would certainly seem to be governed by *Morton, supra*. Perhaps there is still another alternative appropriate for the strike subsidy line of cases, *e.g.*, a test such as that proposed by Professor Cox in Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972).

2. Although in Law the Federal Interest is Paramount and by Logic Substantial State Subsidies have an Impact on Free Collective Bargaining, the Court Below, Nonetheless, Places on the Plaintiff the Burden of Proving Both Infringement of the Federal Interest and Lack of State Interest and then, to Boot, Imposes a Test that, in Effect, Prejudges the Issue.

The problem of preemption is one of seeing where and to what extent state interests can coexist with the federal interest. However, the federal, not the state, interest is paramount. This the court below twists 180 degrees by imposing the burden of proof on the plaintiff.

Then, and more grievous still, for a test the court requires a mountain of statistical and subjective evidence. This test is so radical and severe that for practical purposes it may well prejudge the case. Whether by calling for data that does not exist or by its sheer stringency, or both, the test might constrain any court to say (or, depending on its presuppositions, readily let it say) that the burden had not been carried.

Assuredly, this approach turns the accepted hierarchy of federal and state interest upside down. It and *Minter*, are the only labor preemption cases imposing such a burden of proof. Worse, it really provides no tool for wide-ranging analysis at all. In the case at bar, the subsidy amounts to 72 per cent of take-home pay without regard to need. But what about the case where it amounts to one per cent of take-home pay? Or what about the case where from day one of the strike it amounts to 100 per cent of take-home pay? To require a Himalaya of evidence in such cases would make no sense at all. Yet, the court below would require exactly that.

Finally, and at the very least, sound judicial administration suggests clarification of the guidelines by this Court. The evidentiary burden imposed by the Court of Appeals presages a prolonged trial, a certain appeal to the First Circuit, and a further petition to this Court. It would be one thing if this burden were congruent with the prior decisions of this Court. It is not, however. Consequently, unless a writ is granted, the parties and the court will engage in an exercise as futile as it is onerous.

Conclusion.

For a final and encapsulating perspective we can do no better than return to the hypothetical case mentioned ear-

lier—the payment by the state to strikers as strikers, without regard to need, of 100 per cent of their take-home pay from the first day of the work stoppage until the last. No one would seriously argue that one theory of preemption or another would be found to prohibit such payments and to do so without an elaborate evidentiary ritual.

The instant case differs in degree only, not in kind from the hypothetical case. Whether, as we believe, this Court has already provided the theory to safeguard federal labor policy or whether the lower courts correctly perceive a gap in preemption theory is in a sense immaterial. The facts show a spreading use of public assistance to finance strikers and a confusion in and hesitancy by the lower courts in approaching and, hence, in correcting this distortion of the bargaining process. These facts together with the overweening importance of the question and the magnitude of the error below make the subject ripe for review by this Court. This case provides the ideal vehicle.

The cross-petition for certiorari should be granted.

Respectfully submitted,

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